C. Immunity of State officials from foreign criminal jurisdiction

In reply to the Commission's question in Chapter III.C of the Report concerning domestic law and practice, in particular judicial practice on the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction and any exceptions to immunity of State officials from foreign criminal jurisdiction, Austria would like to provide the following information.

1. Official Statements

In connection with a traffic offence committed by the Honorary Consul of a foreign State in Austria, the Legal Office of the Federal Ministry of Foreign Affairs had to decide whether the Honorary Consul enjoyed jurisdictional immunity in Austria The Office came to the conclusion that the term "official acts performed in the exercise of their functions" used in Article 71 (1) of the Vienna Convention of 1963 on Consular Relations was subject to a stricter construction with regard to the immunity than the term "acts performed in the exercise of their consular functions" used in Article 43 of this Convention This stricter construction was

also derived from the commentary of the ILC on the relevant draft provision, which explicitly confirmed this interpretation

This view can also be based on the following two grounds Since the immunity is granted to the sending State, the immunity can be enjoyed only for acts that are directly attributable to this State, such as official acts As the appointment of a national of the receiving State as member of a consular mission requires the consent of the latter State, the immunity granted to this person can only be a restricted immunity as far as it is necessary for the exercise of the consular function Accordingly, this immunity relates only to official acts For this reason it is likely that an honorary consul in Austria who is an Austrian national is not exempted from the administrative jurisdiction with relation to a minor traffic delict.[1]

2. Judicial Practice

Austrian Administrative Court, Decision of 18 June 1982[2]

The Danish Honorary Consul in Austria, being an Austrian citizen, was fined after not respecting traffic rules in a certain area of Vienna when driving to the Danish embassy. He appealed against this fine by invoking his immunity. The administrative Court decided that in a case instituted by a honorary consul with Austrian nationality immunity from jurisdiction and personal inviolability existed only in relation to official acts performed in the exercise of his functions according to Article 71 of the Vienna Convention of 1963 on Consular Relations The Court held that "driving a car" by a consular agent in principle did not qualify as an official act performed in the exercise of his functions, since such an activity did not appertain to the consular functions enumerated in Article 5 of the Convention The Court held further that although driving a car by a consular agent constituted one of the possibilities to transport him to the place of the exercise of his consular functions, the conclusion was nevertheless not justified that, accordingly, the driving of the car necessarily becomes an official act. Even if it could be argued that a different conclusion would be justified if the conduct prohibited by the traffic rules constituted the only possibility to reach the place of the exercise of consular functions, in the present case the honorary consul could not prove that he could reach the destination exclusively by disregarding the traffic prohibition.

Moreover the complainant ignored that Article 71 of the Vienna Convention only referred to "official acts performed in the exercise of their functions" in contrast to Article 43 that used the expression "acts performed in the exercise of their consular functions". The driving of a car did not constitute an "official act"

Similar decisions were delivered by the Austrian Administrative Court, on 24 June 1983, Zl 83/02/0166, as well as on 14 March 2000, ZL 2000/11/0044, and by the Supreme Court on 14 May 1986, Zl 1Ob7/86.

See also Austria's statements in the Sixth Committee (see attachments):

- *Statement 2012, Cluster III*
- *Statement 2013, Part I*
- *Statement 2014, Cluster II*

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[1] Gerhard Hafner, Die osterreichische diplomatische Praxis zum Volkerrecht 1981/82, Osterreichische Zeitschrift fur öffentliches Recht und Volkerrecht vol 33 (1982), p 379.

[2] Reproduced in German in Peter Fischer, Die österreichische Judikatur zum Volkerrecht 1982/83, Zeitschrift fur offentliches Recht und Volkerrecht vol 33 (1984), p 394

Permanent Mission of Austria
to the United Nations in New York

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67th Session
of the General Assembly
Sixth Committee

Agenda Item 79

Report of the International Law Commission

on the Work of its 64th Session

Cluster III: immunity of state officials; provisional application of treaties;formation and evidence of customary international law; the obligation to extradite or prosecute; treaties over time; and most-favoured-nation clause

Statement by

Professor August Reinisch

Delegation of Austria

New York, 2 November 2012

Mr. Chairman,

Permit me to start with the topic of **"immunity of state officials from foreign criminal jurisdiction"**. We wish the new Special Rapporteur, Ms. Concepción Escobar Hérnandez, full success in the further elaboration of this topic. Her preliminary report submitted to the Commission this year already showed remarkable insight in this topic which in Austria's view is of particular importance, reflected also in various recent judicial decisions.

In her preliminary report, the Special Rapporteur pointed out several issues that, in her view, deserve particular attention and were intensively discussed in the Commission. Although the Commission has not yet presented specific draft articles which could be commented upon, Austria nevertheless would like to contribute to the discussion already at this moment.

As to the fundamental approach to be taken by the Commission, i.e. restatement of lex lata or progressive development de lege ferenda, Austria has already stated last year that the starting point must be the identification of the existing norms of international law. Once this has been done, the Commission should embark on a possible progressive development in accordance with the present needs of the international community.

Therefore, Austria gives priority to the inductive approach based on the existing norms the result of which could later on be juxtaposed to the results of a value based deductive approach and the identification of trends that emerged in recent time.

When this topic was started in the Commission, Austria already referred to the need of drawing clear distinctions between the different kinds of immunities, the different categories of beneficiaries, the scope of the immunities and the different circumstances under which immunities can be invoked. In particular, attention has to be paid to the difference between immunity in civil and in criminal proceedings.

As to the scope of the topic, Austria maintains the view that it does not encompass the issue of jurisdiction and that, therefore, there is no need to address in this context also the issue of universal jurisdiction. The present topic is confined to the question as to whether states, once they are exercising criminal jurisdiction, are impeded in this exercise by the immunity of foreign state officials under international law.

As far as the so called troika enjoying immunity ratione personae is concerned, we believe – and thereby we also reply to a question raised in Chapter III of the Commission's report – that present customary international law does not extend this

particular immunity to other high ranking officials who, nevertheless, could enjoy immunity ratione materiae.

A central point of the discussion of the immunity ratione materiae is undoubtedly the definition of officials or persons acting on behalf of a state in an official capacity. In this context it has to be examined whether the rules of attribution defined by the Articles on State Responsibility could be helpful to distinguish between persons acting on behalf of a state and other persons. It would also be necessary to define the official acts of a state for which immunity could be invoked.

Another major point is the possibility of exceptions to such immunity, either ratione personae or ratione materiae. Austria has already indicated last year that certain exceptions for international crimes are evolving and that therefore further reflection on this complex issue is necessary.

Finally, in view of the procedural nature of immunities, Austria shares the view that it is necessary also to discuss the procedural elements, such as the point in time determining the extent of the immunity.

Mr. Chairman,

Permit me now to turn to the topic of the **"provisional application of treaties"**. Austria welcomes the inclusion of this topic into the agenda of the Commission and the appointment of Mr. Juan Manuel Gómez-Robledo as Special Rapporteur.

In recent times, provisional application has increasingly been resorted to although neither the conditions under which it is available nor its legal effect is undisputed. Since legal doctrine has also not very frequently dealt with this matter, provisional application remains vague and ambiguous.

For instance, one question is that of the scope of the provisional application of a treaty. Article 25 of the Vienna Convention of the Law of Treaties does not specify the extent to which a treaty is applied if it is provisionally applied, whether in its entirety, including also its procedural provisions like dispute settlement, or only partly, relating only to provisions of substance.

Another issue is whether provisional application of a treaty can be based on a unilateral declaration - as the UN Treaty Handbook seems to suggest - or whether an agreement of all states parties is needed for this purpose. The wording of Article 25 of the Vienna Convention favors the latter alternative, as it explicitly refers to the wording of the treaty itself or to an additional agreement of the negotiating states, which means of all negotiating states

Provisional application raises a number of problems in relation to domestic law. It was argued that provisional application was possible even if domestic law including the constitution of a state was silent on this possibility. The opposite position is that domestic law defines the procedures by which a state accepts international commitments in an exhaustive manner. In addition, it also has to be pointed out that there is a certain tension between provisional application and parliamentary approval procedures based on the idea of democratic legitimacy.

The Austrian constitution does not contain any rules on the provisional application of treaties. However, since Austria has become a member of the European Union in 1995 and in view of the EU practice of provisional application, the need arose to apply provisionally certain treaties with third countries. Austria accepted this practice, but in order to respect democratic legitimacy it applied such treaties provisionally only after their approval by the Austrian parliament. If the treaty does not specify that the provisional application becomes effective only upon notification, allowing Austria to conclude its parliamentary procedure, Austria has adopted the practice of declaring that it would apply the treaty provisionally only after its parliamentary approval in Austria.

The Special Rapporteur also raised the question of the relation between Article 25 and Article 18 of the Vienna Convention, the latter regarding non-frustration. It is our view that these two issues concern different problems and should be kept separately, although both provisions apply simultaneously. Whereas provisional application is subject to its own conditions and may entail a restricted extent of application of a treaty, the duty not to frustrate the object and purpose of a treaty relates to the whole treaty.

Mr. Chairman,

Austria welcomes the plan of the Commission to contribute to the clarification of the formation and evidence of **customary international law** and the appointment of Sir Michael Wood as Special Rapporteur.

As to the scope of this topic, Austria is in full support of the Special Rapporteur's intention to limit it to "secondary" or "systemic" rules on the identification of customary international law.

With regard to the potential inclusion of jus cogens in the topic, subject to further discussion Austria sees no difficulty in including it although this issue does not seem to be inherently linked to customary law. *Norms of international law, whether conventional, customary or otherwise, may or may not have peremptory character.*

Thus, while one may not be able to exclude the jus cogens character of some customary law rules, this is not intrinsically linked to the question of custom

As to the analysis of the case-law, Austria considers that the judicial findings of both international and domestic courts and tribunals should be scrutinized; the emphasis of the Commission's work should be on a critical assessment of how the different courts and tribunals have identified customary rules. Such an approach would be in line with the Commission's intention to focus on "secondary" rules.

In this respect, Austria agrees with the suggestion that the Commission's work should focus on an analysis of the elements of state practice and opinio juris, including their characterization, their relevant weight and their possible manifestations in relation to the formation and identification of customary international law.

Austria further agrees that the extent to which these two elements were actually relied upon by courts and tribunals as well as by states should be a central aspect of the Commission's work in order to help clarify and solidify the formation and identification of customary international law.

In view of the wide range of other points that may be covered by the Commission, Austria suggests limiting the work to the core issues, such as the identification of state practice and opinio juris; the potential change of the process of the formation of rules of customary international law; the degree of participation by states in their formation - including the "persistent objector" debate - as well as the so-called "words" vs "actions" problem.

In Austria's view this project of the Commission is not suited to lead to a convention or similar form of codification. Rather, it could provide useful guidance for practitioners on various levels to identify and to prove custom in the form of guidelines or conclusions with commentary.

Mr. Chairman,

As to the topic ***"extradite or prosecute"*** *Austria recognizes the work that was done so far by the former Special Rapporteur, Professor Zdyslaw Galicki. His work already identified the various problems connected with this topic and by doing so considerably contributed to its further elaboration.*

Austria concurs with the views expressed in the Commission that presently stocktaking is needed in order to decide in which direction this topic should be continued or whether it should be terminated.

It seems that the view prevails that there is no duty to extradite or prosecute under present customary international law and that such obligations only result from specific treaty provisions. These individual treaty provisions can be of a different content so that a harmonization would hardly be feasible. Therefore, Austria would not object to terminate this topic.

However, should the Commission decide to pursue this topic, Austria recommends to consider also the result of the working group established in 2009, which constituted a valuable supplement to the work of the Special Rapporteur.

Mr. Chairman,

Austria welcomes the reorientation and upgrading of the issue of **"treaties over time"**, so far discussed in a study group, into the full-fledged topic "subsequent agreement and practice" and the appointment of Professor Georg Nolte as Special Rapporteur. *In view of this change, the discussion will be focused on Article 31 of the Vienna Convention on the Law of Treaties and deal with widely disputed issues in the framework of the interpretation of treaties. Judicial practice has already revealed that this field requires clarification in order to avoid conflicting results of interpretation that could endanger the stability of treaty relations.*

The Special Rapporteur offered preliminary conclusions that are based on existing judicial and other state practice and deserve comments.

As regards the role of subsequent practice in the interpretation of a treaty, Austria is not convinced that the subsequent practice of only one or less than all parties is sufficient. In order to serve as context for the interpretation of a treaty, the practice must, according to Article 31, embrace all states parties unless an effect only for certain states is envisaged.

As to the relation between formal interpretation procedures and practice as a means of interpretation it has been demonstrated that formal procedures do not exclude the consideration of subsequent practice for interpretation purposes.

Concerning the relation between formal modification of a treaty and interpretation by subsequent practice, states sometimes prefer resorting to interpretation over formal modification, because it allows them to avoid national approval procedures for treaty modifications. However, one has to take into account that a proposal according to which treaties could be modified by subsequent practice was defeated at the Vienna Conference on the Law of Treaties.

Mr. Chairman,

Austria regards the work undertaken by the Commission concerning the **"most-favoured-nation clause"** as a valuable contribution to clarifying a specific problem of international economic law which has led to conflicting interpretations, in particular, in the field of international investment law

Austria finds that the extremely contentious interpretation of the scope of MFN clauses by investment tribunals makes it highly questionable whether the work of the Commission could lead to draft articles. Nevertheless, there is certainly room for an analytical discussion of the controversies regarding MFN clauses.

These controversies can best be illustrated by reference to recent judicial developments: After the 2000 Maffezini v. Spain decision (Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000) investment tribunals have been split on whether MFN clauses reach beyond the "importation" of substantive protection Tribunals now follow the entire range of possible outcomes, from denying any effect of MFN clauses beyond substantive protection to permitting the importation of all - substantive, procedural and jurisdictional - advantages of other bilateral investment treaties

As regards the main problem of the proper scope of MFN clauses, Austria considers that this issue is primarily a question of treaty interpretation and that it depends in first line on the specific wording of the applicable MFN clause whether it includes or excludes procedural and jurisdictional matters.

The Commission should also clarify the relation of MFN clauses stricto sensu to similar clauses, like the most favoured organization clauses in headquarters agreements Pursuant to these clauses Austria concludes supplemental agreements to headquarters agreements extending terms and conditions granted to other organizations to the organization concerned. These clauses stipulate that their effect is not automatic, but depends upon an additional agreement. This clearly contrasts with the MFN clause usually found in trade and investment treaties.

Thank you, Mr. Chairman.

Permanent Mission of Austria
to the United Nations in New York

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68th Session of the
United Nations General Assembly

6th Committee

Agenda Item 81:

Report of the International Law Commission on the Work of its 63rd and 65th Session

Part I (Chapters I-III, IV, V und XII)

Statement by

Gregor Schusterschitz

Head of the Department of International Law
Ministry for European and International Affairs

New York, 28 October 2013

Mr Chairman,

Before offering the comments of Austria on the items falling under Cluster I we would like to make a general comment: We appreciate the high quality of the reports submitted by the Special Rapporteurs of the International Law Commission and by the Commission itself. However, their quality could be further enhanced by a better reflection of the views expressed by states, both in written contributions and in the discussions of the Sixth Committee

Mr. Chairman, let me now address the topics under Cluster I

(Subsequent practice)

Austria welcomes the reorientation and focusing of the issues initially examined under the name of "treaties over time" as a full topic entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" We appreciate the work of Professor Georg Nolte as Special Rapporteur and of the Drafting Committee, which has provisionally adopted five draft conclusions on this topic.

The discussion in the Commission was very helpful as it clarified a number of aspects contained in article 31 of the Vienna Convention on the Law of Treaties. Judicial practice has already revealed that this field requires clarification in order to avoid conflicting interpretations that could endanger the stability of treaty relations.

The Special Rapporteur offered preliminary conclusions that are based on existing judicial and other state practice and deserve comments:

1. In Austria's view, conclusion 4 para.1 deserves clarification It should be mentioned already in the text of the conclusion that the "agreement" that may constitute a "subsequent agreement" in the sense of that conclusion does not need to be a treaty in the sense of the Vienna Convention on the Law of Treaties. Also informal agreements and non-binding arrangements may amount to relevant "subsequent agreements "

Equally, interpretative declarations by treaty bodies can be regarded as such "subsequent agreements". In this sense, the NAFTA Arbitral Tribunal, in the case of Methanex Corporation v. United States of America, qualified the NAFTA Free Trade Commission's interpretation of NAFTA provisions as "subsequent agreement"[1] *It stated "It follows from the wording of Article 31(3)(a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a treaty, [ ] the Tribunal has no difficulty in deciding that the [Free Trade Commission's] Interpretation is properly characterized as a "subsequent agreement" on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention "*

[1] Final Award on Jurisdiction and Merits, 3 August 2005, II B, paras 20, 21

2 In this respect the delegation of Austria would like to draw attention to the fact that the Guidelines of the Commission on Reservations also deal with "interpretative declarations", and that there may be a need to bring the results of the work of the Commission on these two topics in line

3. As regards the role of subsequent practice in the interpretation of a treaty as referred to in draft conclusion 4 para 3, Austria wishes to emphasize that the subsequent practice of only one or of less than all parties to a treaty can only serve as supplementary means of interpretation under the restrictive conditions of article 32 of the Vienna Convention

(Immunity)

Mr. Chairman,

Regarding the subject of "Immunity of state officials from foreign criminal jurisdiction", my delegation commends the Special Rapporteur, Concepción Escobar-Hernández, for the most valuable report on the first articles on this topic It is of particular interest to my delegation The general significance of this topic is reflected in the already rich relevant judicial practice of national and international courts and tribunals dealing with these questions

Draft article 1 regarding the scope of the draft articles raises the question of the meaning of decisive terms, such as "state officials" and "criminal jurisdiction". We note that the term "officials" will be defined at a later stage, but in our opinion also the expression "criminal jurisdiction" needs further clarification. Usually it is confined to the jurisdiction of national criminal courts or tribunals Nevertheless, already the ILC commentary on article 29 of the Vienna Convention on Diplomatic Relations attaches a broader meaning to this expression, as it includes also the criminal jurisdiction exercised by administrative authorities In Austria's view, the same clarification would be needed with respect to the present draft articles.

A further issue related to the exercise of "criminal jurisdiction" is whether preliminary investigatory steps can be conducted irrespective of a possible immunity. Austria is of the opinion that measures to ascertainthe facts of a case are not precluded by immunity. The procedural bar of immunity is only relevant once formal proceedings are to be instigated against a person

It must also be clarified to what extent so-called hybrid courts fall under the ambit of the draft articles Because of the ambiguous nature of such institutions, it has to be clarified whether immunity can be invoked before them This problem arises in particular in cases where individuals of third states are involved

A further issue that merits clarification is whether the immunity can be invoked also in relation to national judicial authorities acting on the basis of an arrest warrant issued by an international criminal tribunal This problem was encountered recently with arrest warrants issued by the International Criminal Court Although the decisions of the ICC regarding Chad

and Malawi of 12 and 13 December 2012 are indicative in this respect, clear guidance by the Commission would be helpful. We believe that a solution should be found which is in the interest of the fight against impunity and respects the rule of law

Austria understands para. 2 of this draft article as a non-exhaustive enumeration of leges speciales concerning immunity. However, it must be clarified whether these special rules take precedence over the draft articles only if the relevant person enjoys a broader scope of immunity under those special rules or also if the special rules provide a lesser amount of immunity than the present draft articles.

Another question is whether these draft articles envisage providing immunity only if persons are present in the state of the forum or also if they are absent In our view, the draft articles, or at least the commentary, should be very clear in this respect. We are of the opinion that such immunity applies also if the person is not in the territory of the forum state.

Mr. Chair, permit me to turn to draft article 3.

Austria supports the limitation of immunity ratione personae to the three categories of persons referred to in the present draft article Although we cannot deny that other persons also carry out similar functions, they only enjoy immunity as members of special missions. As such they fall under the exception of draft article 1, para 2

A still open issue, so far not addressed by the Commission, is whether family members accompanying the relevant persons would also benefit from this immunity. Also in this context Austria suggests that the Commission follow the approach of the immunity of special missions

As to draft article 4, there is no doubt that this immunity is enjoyed only during the term of office as expressed in para. 1. Immunity as a procedural device would bar any formal proceeding during this time, even if the relevant acts were committed prior to the taking of office.

(Protection of the atmosphere)

We take note with great interest that the topic "Protection of the atmosphere" has been placed on the agenda of the Commission and we are looking forward to seeing the first report Due to the limits of this topic decided by the Commission, it seems that only a restricted number of issues can be addressed. However, it will be unavoidable to address in this context also some of the issues currently excluded from the mandate, such as liability or the precautionary principle

(Crimes against humanity)

Austria welcomes the inclusion of the topic „Crimes against humanity" in the long-term working plan of the Commission The Rome Statute of the International Criminal Court certainly cannot be the last step in the endeavor to prosecute such crimes and to combat impunity. The Court is only able to deal with a few major perpetrators, but this does not take away the primary responsibility of states to prosecute crimes against humanity Although the Preamble of the Rome Statute requires states to adopt the necessary legislation in order to be able to prosecute the crimes within the jurisdiction of the ICC, including crimes against humanity, such legislation is still missing in a large number of states This also engenders a lack of cooperation among states in this area. Austria supports the efforts undertaken by a number of states to improve this cooperation on the basis of a new legal instrument. Tthis initiative was also addressed this year in Vienna during the annual meeting of the UN Commission on Crime Prevention and Criminal Justice Unfortunately, it was not yet possible to adopt a resolution advancing this topic at that meeting. We would welcome a close cooperation between the ILC and the promoters of the initiative to improve legal cooperation in the area of combatting crimes against humanity The result of the work of the ILC on this topic should contribute to close the cooperation gaps which have been identified.

Thank you, Mr. Chairman

PERMANENT
MISSION
OF AUSTRIA
TO THE UNITED
NATIONS IN NEW YORK

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69th Session

of the General Assembly

Sixth Committee

Agenda Item 78

Report of the International Law Commission

on the Work of its 66th Session

Cluster II: The obligation to extradite or prosecute (Chapter VI), Subsequent agreements and subsequent practice in relation to the interpretation of treaties (Chapter VII), Protection of the atmosphere (Chapter VIII), Immunity of state officials from foreign criminal jurisdiction (Chapter IX)

Statement by

Ambassador Helmut Tichy

New York, 29 October 2014

Mr. Chairman,

Austria takes note of the work of the Working Group regarding the topic **"The obligation to extradite or prosecute (aut dedere aut iudicare)"** and commends the Special Rapporteur Mr. Kriangsak Kittichaisaree and the Working Group for the final report. It provides a valuable presentation of the full scope of this topic

Austria has consistently stated that there is no duty to extradite or prosecute under customary international law and that such an obligation results only from specific treaty provisions This situation makes it also difficult to establish a common legal regime for this topic A report such as the one now before us seems to be the only way to deal with this matter As indicated already in our previous statements, we do not object to the conclusion of this topic.

As to the substance of the report, I would only like to refer to the observation of the Commission in paragraph 14 of the report concerning the existence of a gap in the present international conventional regimes regarding most crimes against humanity This issue is certainly a matter that should be addressed in the framework of the topic of crimes against humanity, a matter to which we have referred to in the discussion under Cluster I.

Mr. Chairman,

The Austrian delegation congratulates the Special Rapporteur, Professor Georg Nolte, on the advancement of the Commission's work on **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** and the formulation of a further set of draft conclusions with commentary

My delegation shares the view expressed in the first sentence of draft conclusion 7 paragraph 3 that the parties to a treaty are presumed not to amend or modify a treaty by subsequent agreement or practice Rather, the presumed intention of the parties is the interpretation of treaty provisions This presumption aptly describes faithfulness to treaty obligations and the principle of pacta sunt servanda

The statement contained in the second sentence of draft conclusion 7 paragraph 3 that "the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" raises some questions. One may strictly adhere to this statement on the basis of the proposed definition of "subsequent practice" in draft conclusion 4 paragraph 2, which is only regarded as "an authentic means of interpretation". In so far as "subsequent practice" is defined as an act of interpretation, it will not extend to amendment or modification.

However, as indicated by the discussions within the Commission, this conclusion leads to the more general issue whether a subsequent practice of treaty parties may modify a treaty In the view of the Austrian delegation, this effect may not be generally excluded Notwithstanding the fact that during the 1969 Vienna Codification Conference on the law of treaties former draft article 38 on the modification of treaties by subsequent practice was not adopted, it seems clear that a "subsequent practice" establishing an agreement to modify a treaty should be regarded as a treaty modification and not merely as an interpretation exercise

Also where no such intention of the parties can be established, general international law does not exclude that states parties to a treaty may create customary international law through their subsequent practice, if accompanied by opinio iuris, and thereby modify the rights and obligations contained in the treaty. This consequence is even reinforced by the fact that

international law does not know any hierarchy between the sources of international law. Thus, the change of international law based on custom by treaty rules and vice versa is a generally accepted phenomenon which the formulation of the second sentence of draft conclusion 7 paragraph 3 should not be understood to exclude

The Austrian delegation appreciates the formulation in draft conclusion 9 paragraph 1 that an agreement under article 31 paragraph 3 subparagraph (a) and (b) of the Vienna Convention on the Law of Treaties "need not be legally binding" We note that apparently the question was not uncontroversial in the deliberations of the International Law Commission As already stated in our previous comments and in particular last year's statement in the Sixth Committee we are convinced that such an "agreement" only has to be an "understanding" indeed and need not be a treaty in the sense of the Vienna Convention Also informal agreements and non-binding arrangements may amount to relevant "subsequent agreements "

With regard to the first sentence of draft conclusion 9 paragraph 2, Austria wishes to emphasize that the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties referred to in the second sentence of this draft conclusion

Mr. Chairman,

We commend the Special Rapporteur Professor Shinya Murase for the elaboration of the first report on the topic of the **"protection of the atmosphere".** The report takes stock of the already existing legal regimes concerning this matter, which prove that States are aware of the particular problems of pollution of the atmosphere Nevertheless, these different regimes pursue only a piecemeal approach insofar as they only regulate individual issues such as, for instance, industrial accidents, the ozone layer or persistent organic pollutants, to name only a few More general conventions such as the 1979 Convention on Long-range Transboundary Air Pollution exclude the topic of responsibility for breaches of its provisions, whereas the Kyoto Protocol raises problems regarding its implementation

Although an all-encompassing regime for the protection of the atmosphere, of either hard or soft law, would certainly be desirable in order to avoid a fragmented approach, it seems that at present states would be reluctant to accept such a regime.

In such a situation, a report on the various legal options to improve the status of the atmosphere could undoubtedly be an important contribution. The most recent studies illustrate convincingly that urgent and concerted efforts are needed in order to save the atmosphere It would thus seem very useful to identify the rights and obligations incumbent upon states which can be derived from various existing legal principles and rules applicable to the protection of the atmosphere

As to the individual draft guidelines, my delegation wonders why draft guideline 1 on the use of terms restricts the definition of the atmosphere to the troposphere and the stratosphere, but excludes the mesosphere and thermosphere which also form part of the atmosphere Neither the Long-range Transboundary Air Pollution Convention nor the Framework Convention on Climate Change limit their scope of application in such a way

The text of draft guideline 2 subparagraph b, according to which the present draft guidelines refer to "the basic principles relating to the protection of the atmosphere", raises the question of its relationship to the understanding of the Commission regarding the scope of

the guidelines. The 2013 understanding explicitly stated inter alia that "the topic will not deal with, but is also without prejudice to, questions such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights." In our view, this demonstrates once more that the understanding of 2013 might be too narrow to permit any meaningful work on this matter

As to draft guideline 3 on the legal status of the atmosphere, it is questionable whether the legal status can be defined before the substance of the rights and obligations is determined The qualification of the atmosphere as a natural resource, whose protection is a common concern of humankind, still leaves open, which particular obligations can be derived therefrom It might seem advisable to embark first on the substance of this matter and then to find the right definition of its legal status

Mr. Chairman,

Regarding the subject of "**Immunity of state officials from foreign criminal jurisdiction**", my delegation commends the Special Rapporteur, Concepción Escobar-Hernández, for the most valuable third report.

The definition of "State official" in draft article 2 subparagraph (e), as adopted by the Commission, reveals the complexities of this term and needs further explanations For instance, the term "State functions" in the definition lacks a clear definition itself In particular, the commentary leaves open whether the scope of "State functions" is only determined by the internal law of the State, as in article 4 of the Articles on the responsibility of States for internationally wrongful acts of the state, or relies on an internationally agreed definition Moreover it is unclear whether there is a distinction between "governmental authority", as used in article 5 of the Articles on state responsibility, and the expression "State functions" used in the present draft article 2

Accordingly, it must be asked whether, for instance, personnel which is contractually mandated by a state to exercise certain security functions would fall under this definition. In this respect, it would be useful to study the relations between the Articles on State responsibility and the present topic in order to clarify how far acts that give rise to state responsibility would fall under the immunity *ratione materiae*

Draft article 5 on persons enjoying immunity *ratione materiae* also raises certain questions There is no definition of the expression "acting as such" For instance, it is unclear whether persons acting in excess of authority (ultra vires) or in contravention of instructions should also enjoy immunity. As to the term "from the exercise of foreign criminal jurisdiction" Austria has stated already last year that this expression needs further clarification. In particular, it should be clarified that this terms also includes the criminal jurisdiction exercised by administrative authorities Furthermore, measures to ascertain the facts of a case are not precluded by immunity, since the procedural bar of immunity is only relevant once formal proceedings have been instituted against a person. Further clarifications are also needed concerning so-called hybrid courts and acts of judicial authorities on the basis of an arrest warrant issued by an international criminal tribunal

My delegation hopes that these issues will be addressed in the further work of the Commission on this topic

Thank you, Mr Chairman.